BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DANIEL ANTHONY BALLARD Claimant	)	
VS.	)	
DONDLINGER & SONS CONSTRUCTION COMPANY, INC. Respondent	)	Docket No. **1,054,021**
AND	)	
ZURICH AMERICAN INSURANCE CO. Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) request review of the May 15, 2012 Award by Administrative Law Judge (ALJ) John D. Clark. The Board heard oral argument on September 21, 2012.

APPEARANCES

W. Walter Craig of Derby, Kansas, appeared for the claimant. Anton C. Andersen of Kansas City, Kansas, appeared for respondent.

RECORD AND STIPULATIONS

The Board has considered the entire record and adopts the stipulations listed in the Award.[1]

ISSUES

The ALJ found claimant sustained a 9% whole body functional impairment and an 87.5% work disability based upon a 100% wage loss and a 75% task loss. The ALJ also found claimant had a 25% preexisting whole person functional impairment which entitled

[1] Although it is not listed in the Award, the Board also considered the September 27, 2011, report of court-appointed physician, Dr. Paul Stein, a neurosurgeon. The Board did not consider the medical exhibits admitted into evidence at the February 24, 2011, preliminary hearing because the parties did not stipulate that such exhibits were part of the record for purposes of the final award.

respondent to a K.S.A. 2010 Supp. 44-501(c) credit. Claimant was awarded permanent partial disability (PPD) based on a work disability of 62.5% (87.5% work disability minus 25% preexisting functional impairment equals 62.5%). Despite the application of the credit, the ALJ concluded claimant was entitled to a $100,000 maximum award.[2]

Respondent argues the ALJ erred in applying the credit for preexisting impairment. Respondent maintains the credit for preexisting impairment should be calculated in accordance with the method approved by the Court of Appeals in *Payne*.[3] Respondent also contends the ALJ erred in awarding any work disability compensation in excess of claimant's functional impairment.

Claimant argues the ALJ's Award should be affirmed.

The issues raised for the Board to review are:

1. Whether the ALJ erred in applying the K.S.A. 2010 Supp. 44-501(c)[4] credit.

2. Whether claimant is entitled to an award of work disability.

    A. Whether the ALJ erred in awarding claimant work disability because there was no causal link between claimant's accidental injury and his wage loss.

    B. Whether the ALJ erred in awarding work disability when claimant was fired by respondent for "making satanic threats."[5]

FINDINGS OF FACT

Having reviewed the evidentiary record, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings:

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[2] See K.S.A. 44-510f(a)(3).

[3] *Payne v. Boeing Co.*, 39 Kan. App. 2d 353, 180 P.3d 590 (2008).

[4] There are a number of references in respondent's brief to the version of K.S.A 44-501(c) which became effective on May 15, 2012. However the substantially amended New Act version, now set forth in K.S.A. 2011 Supp. 44-501(e), is inapplicable to this claim. See K.S.A. 44-505(c); *Bryant v. Midwest Staff Solutions, Inc.*, 292 Kan. 585, 257 P.3d 255 (2011).

[5] Respondent's brief at 11 (filed Jun. 22, 2012).

The accidental injury in this claim occurred on October 19, 2010. Prior to that accident, claimant sustained an accidental injury, also while working for respondent, on December 20, 2007, "and each and every working day thereafter."[6] Both the 2007 and 2010 accidents involved cervical spine injuries and both required surgical treatment performed by the same neurosurgeon, Dr. B. Theo Mellion. The first surgery was performed on March 27, 2008, and consisted of an anterior cervical diskectomy with interbody fusion at C5-6 and C6-7. Claimant had a good result from the 2008 surgery and he returned to regular duty work.

At a settlement hearing before SALJ John C. Nodgaard on September 5, 2008, claimant settled his 2007 claim on a full and final basis for a lump-sum payment of $34,383.34, which represented a 25% permanent functional impairment to the whole person, reduced by an 8% discount. A report of an August 4, 2008, evaluation performed by Dr. Paul S. Stein, a neurosurgeon, was admitted into evidence by Judge Nodgaard. The report contained Dr. Stein's 25% impairment rating to the whole person.

As noted above, claimant again sustained personal injury by accident arising out of and in the course of his employment with respondent on October 19, 2010. On April 12, 2011, Dr. Mellion performed another surgery consisting of posterior three-level cervical laminectomies and foraminotomies, with segmental instrumentation and bone grafting, resulting in the fusion of the C4-5, C5-6, and C6-7 levels of claimant's spine.

A regular hearing was held before ALJ John D. Clark on February 20, 2012. The compensability of the 2010 accidental injury was stipulated. Following claimant's second surgery, he ultimately returned to work for respondent, performing restricted duty in the nature of a nighttime security guard. As part of the light-duty position, claimant was required to keep written Security Inspection Logs with hourly entries and any general comments of claimant. Security Logs filled out by claimant for seven days in August 2011 were admitted into evidence at the regular hearing.[7] Claimant wrote various symbols and words on the Security Logs, along with a bloody fingerprint, which are characterized as satanic and threatening by respondent's counsel. However, a review of the Logs and claimant's testimony demonstrates the written comments and drawings are not subject to rational interpretation, although it is understandable that respondent would consider it improper for claimant to cover a required, work-related document with gibberish and doodles. Apparently, claimant last worked for respondent on August 12, 2011, and has engaged in no employment since that date.

[6] R.H. Trans., Resp. Ex. 1 at 11.

[7] *Id.*, Resp. Ex. 2.

ALJ Clark entered an order on July 14, 2011, appointing Dr. Stein to evaluate claimant's complaints of left elbow symptoms and determine whether those symptoms were causally related to claimant's 2010 accident. The ALJ received Dr. Stein's report on October 19, 2011.

The only medical evidence in this claim, other than Dr. Stein's IME report, is from Dr. David W. Hufford, a specialist in occupational and sports medicine, who testified by deposition on February 23, 2012. Dr. Hufford testified claimant had a 25% permanent functional impairment to the whole person as a consequence of the 2007 injury and resulting two-level cervical fusion. In Dr. Hufford's opinion, claimant sustained an additional 9% permanent whole body functional impairment as a result of claimant's 2010 injury. Dr. Hufford imposed permanent physical restrictions. The doctor reviewed a task list prepared by vocational consultant Jerry D. Hardin[8] and concluded claimant sustained a task loss of 75%. The ALJ awarded claimant PPD based on a work disability of 62.5% (100% wage loss plus 75% task loss equals 175, divided by two equals 87.5%, minus the 25% preexisting functional impairment equals a work disability of 62.5%)

The ALJ awarded claimant temporary total disability benefits for 8.94 weeks at the rate of $545 per week, totaling $4,872.30 followed by PPD at $545 per week not to exceed a $100,000 maximum award. Respondent timely requested Board review.

PRINCIPLES OF LAW

K.S.A. 2010 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2010 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

The Workers Compensation Act provides that compensation awards should be reduced by the amount of preexisting functional impairment when the injured worker aggravates a preexisting condition. The Act provides:

[8] Mr. Hardin met with claimant and developed a list of the job tasks claimant performed in the 15-year period before claimant's 2010 accidental injury and the physical requirements associated with each task. Mr. Hardin testified by deposition on February 23, 2012. The record contains no other vocational evidence.

> The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.[9]

The burden of proving a claimant's amount of preexisting impairment belongs to respondent once claimant has come forward with evidence of aggravation or acceleration of the preexisting condition.[10]

ANALYSIS

Respondent maintains the Board apply respondent's K.S.A. 44-501(c) credit for preexisting functional impairment as did the Kansas Court of Appeals in *Payne*. The Board disagrees and affirms the ALJ's Award.

Payne involved a claimant whom all parties agreed suffered from a permanent total disability (PTD) as a consequence of her 2002 work-related injury. The ALJ and the Board found claimant's 2002 accidental injury aggravated her preexisting condition and that claimant had a 35% preexisting permanent functional impairment to the whole body. The Board found respondent was entitled to a credit pursuant to K.S.A. 44-501(c), which should be applied to reduce claimant's PTD award. The Board in *Payne* agreed with the ALJ that the credit should be applied using the following four-step process:

1. Determine the number of weeks the $125,000 PTD award would take to pay out utilizing the applicable compensation rate of $417, which was 299.76 weeks.

2. Determine the number of weeks it would take to pay PPD, at the same rate, based on the preexisting 35% whole body functional impairment, which was 145.25 weeks.

3. Subtract 145.25 weeks from 299.76 weeks, which equaled 154.51 weeks.

4. Multiply 154.51 weeks and the $417 weekly compensation rate, the product of which represented the PTD claimant was entitled to receive.

Based on this four-step method, Board in *Payne* found claimant was entitled to a PTD award for 154.51 weeks (299.76 weeks minus 145.25 weeks equals 154.51 weeks), at $417 per week, totaling $64,430.67.

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[9] K.S.A. 2010 Supp. 44-501(c).

[10] *Hanson v. Logan U.S.D. 326*, 28 Kan. App. 2d 92, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001).

In *Payne*, the Kansas Court of Appeals affirmed the Board's Order.

If the *Payne* method is utilized in this claim, the PPD award, not including the TTD awarded but already paid, would total $38,586, as reflected in the following table.

$100,000.00	Total Award
- $4,870.18	TTD benefits already paid
= $95,129.82	PPD Awarded
÷ $545.00	Weekly compensation rate
= 74.55	PPD weeks
- 103.75	415 x 25% preexisting PPD credit
= 70.8	PPD weeks after credit
x $545.00	
$38,586.00	Net PPD Award

The credit statute does not specify how the preexisting impairment should be applied to reduce an award for a subsequent aggravating injury. Nor does the statute indicate there is only one method by which a credit may be applied to effectuate the intent of the statute. The Court of Appeals in *Payne* did not find the method it approved under the circumstances of that claim is the only mechanism by which the credit may be applied. Respondent has cited no case law to support its position that the Board must follow "the mandate of *Payne*"[11] to apply a credit for preexisting impairment to reduce a subsequent award of work disability.

The Board is mindful of the recent guidance from our appellate courts regarding the interpretation of the Act. As noted in *Bergstrom,*[12] courts must give effect to a statute's express language rather than determine what the law should or should not be. Nor should a court add something not readily found in the statute.

[11] Respondent's brief at 5 (filed Jun. 22, 2012).

[12] *Bergstrom v. Spears Mfg. Co.*, 289 Kan. 605, 214 P.3d 676 (2009).

The respondent in *Jamison*[13] also contended that all credits for preexisting functional impairment should be calculated in accordance with *Payne*. The Board commented as follows:

> It is significant that *Payne* involved a claim for permanent total disability. Where a claimant had a preexisting functional impairment and sustains a work disability following a subsequent compensable injury, the Board has used a different method to calculate the credit. In *Gethins*,[14] the Board determined claimant had a 37% wage loss and a 55% task loss for a 46% work disability. Gethins had an 8% preexisting functional impairment for a back condition. The Board reduced claimant's work disability to 38% by subtracting claimant's 8% preexisting functional impairment from claimant's 46% work disability. Gethins objected. The Kansas Court of Appeals affirmed and stated:
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> > Its [Board's] opinion was based on American Medical Association guidelines and provides an adequate basis to affirm the Board's determination that claimant had an 8% preexisting impairment. Additionally, there is substantial competent evidence to affirm the Board's decision to reduce claimant's permanent partial general disability award by 8% due to her preexisting impairment.[15]

The Board finds the ALJ properly applied respondent's K.S.A. 2010 Supp. 44-501(c) credit in this claim.

Respondent would have the Board deny work disability benefits because: (1) there was no causal connection between claimant's work-related injury and his ultimate wage loss, and (2) claimant was fired for making satanic threats to his employer. Respondent argues "the Court of appeals went too far when they eliminated it in *Tyler*."[16] These contentions require little discussion.

Assuming the accuracy of respondent's assertions about the lack of connection between claimant's accidental injury and his wage loss, and that claimant's alleged satanic

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[13] *Jamison v. Sears Holding Corp.*, No. 1,054,942, 2013 WL 1384389 (Kan. WCAB Mar. 8, 2013).

[14] *Gethins v. Cedar Living Center,* No. 90,129, 2004 WL 1245613 (Kansas Court of Appeals unpublished opinion filed Jun. 4, 2004).

[15] *Id.* This methodology was also applied in *Criswell v. U.S.D. 497*, No. 104,517, 2011 WL 5526549, (Kansas Court of Appeals unpublished opinion filed Nov. 10, 2011), *rev. denied* (Feb. 4, 2013).

[16] Respondent's brief at 11 (filed Jun. 22, 2012).

threats resulted in his termination by respondent, the Board finds those arguments must fail. The *Bergstrom* and *Tyler*[17] decisions, and their progeny, have not been overruled or modified by the Kansas Supreme Court and they are accordingly precedent which are binding on the Board. Whether those opinions were correctly or incorrectly decided is immaterial.

Under the statutory interpretations of *Bergstrom* and *Tyler* the reason for the employee's wage loss is irrelevant in determining whether, and to what extent, work disability should be awarded.[18] There need be no nexus between claimant's wage loss and the injury.

CONCLUSIONS

1. The ALJ correctly applied the K.S.A 44- 501(c) credit for claimant's preexisting functional impairment.

2. The ALJ properly awarded claimant work disability benefits.

The record does not contain a filed fee agreement between claimant and his attorney. K.S.A. 44-536(b) mandates that the written contract between the employee and the attorney be filed with the Director for review and approval. Should claimant's counsel desire a fee be approved in this matter, he must file and submit his written contract with claimant to the ALJ for approval.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.[19] Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

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[17] *Tyler v. Goodyear Tire & Rubber Co.*, 43 Kan. App. 2d 386, 224 P.3d 1197 (2010).

[18] See also *Smith v. Hy-Vee Food Stores*, No. 105,911 (Kansas Court of Appeals unpublished opinion filed Dec. 16, 2011) (award of work disability affirmed even though claimant voluntarily quit working); *Criswell v. U.S.D 497*, No. 104,517 (Kansas Court of Appeals unpublished opinion filed Nov. 10, 2011) (award of work disability affirmed despite claimant's termination for cause for post injury misconduct); *Osborn v. U.S.D. 450*, No. 102,674 (Kansas Court of Appeals unpublished opinion filed Nov. 12, 2010) (award of work disability affirmed when claimant voluntarily quit working).

[19] K.S.A. 2010 Supp. 44-555c(k).

AWARD

WHEREFORE, it is the Board's decision that the Award of ALJ John D. Clark dated May 15, 2012, is hereby affirmed in all respects.

IT IS SO ORDERED.

Dated this _____ day of April, 2013.

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BOARD MEMBER

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BOARD MEMBER

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. . BOARD MEMBER

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